Bank Utama (M) Bhd v Periamma a/p Vellasamy

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6(S2)-24-1611 OF 2000
AZMEL J
20 AUGUST 2002

Land Law *— Restraint on dealings — Caveats — Removal — Whether caveator had caveatable interest — Whether there was a serious question to be tried — Balance of convenience*

The plaintiff granted a loan to the vendors to finance the purchase of the flat. The loan was secured by an assignment of the vendors' rights, interest and title under the sale and purchase agreement and the flat. The loan agreement between the vendors and the plaintiff stipulated that upon issuance of strata title to the flat, the vendors shall transfer and register the flat in their names and execute a first legal charge in favour of the plaintiff. The strata title to the flat was issued by the relevant authorities on 28 March 1989 but the charge was not created by the vendors in favour of the plaintiff. On 5 July 1994, the vendors entered into an agreement to sell the flat to the defendant at a price of RM58,000. The defendant paid RM11,600 to the vendors upon signing the sale agreement. In order to secure her interest, the defendant entered a private caveat on the strata title. Subsequently, on 17 September 1996, the defendant entered another private caveat since the earlier caveat had expired. The vendors failed to complete the sale of the flat and as a result, the defendant filed an action against the vendors on 4 February 1997 to seek specific performance of the sale agreement. On 25 June 1999, the plaintiff terminated the loan to the vendors due to the vendors' default. At that time, a charge was still not registered in the plaintiff's name. On 20 July 1999, the plaintiff attempted to register a legal charge over the strata title but could not do so due to the presence of the private caveat entered by the defendant. This was the plaintiff's application under s 237 of the National Land Code 1965 ('NLC') for an order to remove the private caveat entered by the defendant.

Held, dismissing the plaintiff's application:

(1) The three stages a court should take in dealing with an application for the removal of a private caveat as stated in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 were: (a) the caveator had a caveatable interest in the property; (b) there was a serious question to be tried; and (c) on a balance of convenience, it would be better to maintain the status quo until the disposal of the action (see p 254G–H).

(2) In the instant case, the defendant had entered into an agreement to purchase the flat and had also filed an action to seek specific performance of the sale agreement. Accordingly, the defendant

had shown to the court that she had a caveatable interest in respect of the flat (see p 255A–B).

(3) The defendant was a person who was claiming title to the flat by virtue of the sale agreement and the RM11,600 she had paid to the vendors. The plaintiff's application was to remove the private caveat entered by the defendant so as to enable the plaintiff to sell the flat. In the light of such circumstances, the defendant had shown the existence of a serious question to be tried (see p 255C–E).

(4) Should the private caveat be removed, there was a likelihood that the flat would be disposed of by the plaintiff and the defendant would be deprived of her legitimate claim to the flat. The balance of convenience was in favour of allowing the status quo to remain. Irreparable damage would be caused to the defendant if the private caveat was removed. Since the defendant had proven the existence of the three stages of test as laid down in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor*, the plaintiff's application for the removal of the private caveat should be dismissed (see pp 255H–256B).

[Bahasa Malaysia summary

Plaintif telah memberi satu kemudahan kepada penjual-penjual untuk membiayai pembelian sebuah rumah pangsa. Pinjaman dijamin oleh penyerahan hak, kepentingan dan hakmilik penjual di bawah perjanjian jual beli dan rumah pangsa tersebut. Perjanjian pinjaman di antara penjual-penjual dan plaintif menetapkan bahawa atas pengeluaran hakmilik strata kepada rumah pangsa tersebut, penjual-penjual hendaklah memindahmilik dan mendaftar rumah pangsa tersebut atas nama mereka dan melaksana cagaran sah pertama memihak kepada plaintif. Hakmilik strata kepada rumah pangsa tersebut dikeluarkan oleh pihak berkausa berkenaan pada 28 Mac 1989 tetapi cagaran itu tidak diwujudkan oleh penjual-penjual memihak kepada plaintif. Pada 5 Julai 1994, penjual-penjual mengikat perjanjian untuk menjual rumah pangsa tersebut kepada defendan pada harga RM58,000. Defendan membayar RM11,600 kepada penjual-penjual selepas menandatangani perjanjian jualan. Bagi menjamin kepentingannya, defendan memasukkan kaveat persendirian atas hakmilik strata. Berikutnya, pad 17 September 1996, defendan memasukkan satu lagi kaveat persendirian oleh kerana kaveat yang lebih awal telah luput. Penjual-penjual gagal menyempurna jualan rumah pangsa tersebut dan akibatnya, defendan memfail satu tindakan terhadap penjual-penjual pada 4 Februari 1997 meminta perlaksanaan spesifik perjanjian jualan itu. Pada 25 Jun 1999, plaintif menamatkan pinjaman kepada penjual-penjual disebabkan keingkaran penjual-penjual. Pada masa itu, satu gadaian masih belum didaftarkan atas nama plaintif. Pada 20 Julai 1999, plaintif cuba mendaftarkan gadaian sah ke atas hakmilik strata tetapi

tidak dapat berbuat demikian disebabkan kewujudan kaveat persendirian yang dimasukkan oleh defendan. Ini merupakan permohonan plaintif di bawah s 237 Kanun Tanah Negara 1965 ('KTN') untuk satu perintah membatal kaveat persendirian yang dimasukkan oleh defendan.

Diputuskan, menolak permohonan plaintif:

(1) Tiga peringkat yang harus diambil oleh mahkamah dalam menguruskan permohonan untuk pembatalan kaveat persendirian seperti yang dinyatakan dalam *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 adalah: (a) pengkaveat mempunyai kepentingan boleh kaveat dalam hartanah tersebut; (b) wujudnya soalan serius untuk dibicarakan; dan (c) atas imbangan kemudahan, adalah lebih baik untuk mengekalkan status quo sehingga penyelesaian tindakan (lihat ms 254G–H).

(2) Dalam kes ini, defendan telah mengikat perjanjian untuk membeli rumah pangsa tersebut dan juga telah memfail satu tindakan untuk memohon perlaksanaan spesifik perjanjian jual. Justeru itu, defendan telah menunjukkan kepada mahkamah bahawa beliau mempunyai kepentingan boleh kaveat berhubung dengan rumah pangsa tersebut (lihat ms 255A–B).

(3) Defendan merupakan seorang yang menuntut hakmilik kepada rumah pangsa itu disebabkan perjanjian jualan dan RM11,600 yang dibayarnya kepada penjual. Permohonan plaintif adalah untuk membatal kaveat persendirian yang dimasukkan oleh defendan supaya membolehkan plaintif menjual rumah pangsa tersebut. Memandangkan keadaan demikian, defendan telah menunjuk kewujudan persoalan serius untuk dibicarakan (lihat ms 255C–E).

(4) Sekiranya kaveat persendirian dibatalkan, adanya kemungkinan bahawa rumah pangsa tersebut akan dilupuskan oleh plaintif dan defendan akan dilucuthakkan tuntutan sah kepada rumah pangsa tersebut. Imbangan kemudahan memihak kepada pengekalan status quo. Kerosakan yang tidak boleh dipulihkan akan disebabkan kepada defendan sekiranya kaveat persendirian dibatalkan. Oleh kerana defendan telah membukti kewujudan tiga peringkat ujian seperti yang dinyatakan dalam *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor*, permohonan plaintif untuk pembatalan kaveat persendirian harus ditolak (lihat ms 255H–256B).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015–3328.

Cases referred to

Eng Mee Yong v Letchumanan [1979] 2 MLJ 212 (folld)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (folld)

Legislation referred to

National Land Code 1965 ss 237, 327, 329

SS Tan (*Wong Lu Peen & Tunku Alina*) for the plaintiff.
Robert Low (*CK Yeoh* with him) (*Ranjit Ooi & Robert Low*) for the defendant.

Azmel J: The plaintiff in this case applied under s 327 of the National Land Code 1965 for an order to remove the private caveat entered by the defendant in respect of a flat held under Suratan Hakmilik PN6204/M2/1/5, Lot No 17895, Mukim Setapak, Wilayah Persekutuan ('the said property'). The brief facts of the case are as follows.

By a sale and purchase agreement dated 29 November 1985, Sundra Moorthy Rengathuri and Shanti a/p Kanapiah ('the vendors') had purchased the said property from Projek Genting Kelang Sdn Bhd at the price of RM37,000. In order to settle the payment of the purchase price, the vendors obtained a housing loan from Bank Utama (M) Bhd ('the plaintiff') for the amount of RM33,300. A loan agreement between the vendors and the plaintiff was signed on 3 September 1988. Part of the terms of the loan agreement stated:

(1) as security for the loan, pending issuance of the strata title to the said property, the vendors shall assign all their rights, title and interest under the sale and purchase agreement aforesaid together with rights and interest to the said property to the plaintiff (cl 6.1);

(2) upon issuance of the strata title to the said property, the vendors shall transfer and register the said property in their names and at the same time, execute a first legal charge on the strata title in favour of the plaintiff to secure the payment of this loan (cl 6.3); and

(3) should the vendors breach the loan agreement, the plaintiff is entitled to sell the said property in such manner as the plaintiff deems fit at a price not less than the estimated market value of the said property (cl 11.2).

On 3 September 1988, the vendors executed a deed of assignment in which the vendors assigned all their rights, title and benefit in and to the said property under the sale and purchase agreement to the plaintiff. The vendors also undertook to transfer and register the said property in their names and at the same time, execute a first legal charge on the strata title in favour of the plaintiff, upon the issuance of the strata title to the said property. On 28 March 1989, the strata title to the said property was issued by the relevant authorities.

On 5 July 1994, the defendant entered into a sale and purchase agreement with the vendors for the purchase of the said property at the price of RM58,000. A sum of RM11,600 was paid by the defendant to the vendors upon signing the sale and purchase agreement. In order to secure her interest over the said property, the defendant entered a private caveat on the strata title of the said property on 11 February 1995. Subsequently, on 17 September 1996 the defendant entered another private caveat since the earlier caveat had expired.

On 4 February 1997, the defendant filed an action in the Kuala Lumpur High Court (Civil Suit No S4–22–66–97) seeking for specific performance of the sale and purchase agreement against the vendors for failure to complete the sale of the said property to the defendant.

On 25 June 1999, because the vendors had breached the terms of the loan agreement, the plaintiff decided to terminate it. At this time, no charge had been registered on the strata title of the said property in favour of the plaintiff. On 20 July 1999, the plaintiff's attempt to register a legal charge over the said property had failed because of the existence of the private caveat entered by the defendant. Hence, this application was filed by the plaintiff against the defendant for the removal of the private caveat entered by the defendant.

The principle to be followed in an application for the removal of a caveat pursuant to s 329 of the National Land Code 1965 had been clearly laid down in the Privy Council case of *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212 where Lord Diplock, in delivering the decision of the Privy Council said at p 215:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for removal of a caveat: he must first satisfy the court on the evidence presented to it his claims to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

Subsequently, the Court of Appeal in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, set out the three stages a court should take in dealing with an application for removal of caveats, as follows:

(1) that the defendant (caveator) had a caveatable interest in the said property;

(2) that there is a serious question to be tried; and

(3) that on the balance of convenience it would be better to maintain the status quo until the disposal of the action.

I propose to examine the plaintiff's application in the light of the principle as laid down by the *Luggage Distributors* case.

Caveatable interest

In respect of this first stage, the defendant contended that she had entered into a sale and purchase agreement with the vendors, in respect of the said property and a sum of RM11,600 equivalent to 20% of the purchase price had been paid to the vendors upon the signing of the said agreement. Subsequently, the defendant had also filed an action against the vendors seeking for specific performance of the sale of the said property. The defendant was able and willing to complete the purchase of the said property from the vendors. In the light of the above circumstances, I was quite satisfied that the defendant had shown to the court that she had caveatable interest in respect of the said property.

Serious question to be tried

On the facts of this case, I was quite satisfied that the defendant was a person who was claiming title to or registrable interest in the said property by virtue of the fact that she had entered into a sale and purchase agreement with the vendors and a sum equivalent to 20% of the purchase price had been paid. The defendant had brought an action for specific performance against the vendors seeking the completion of the purchase of the said property. The defendant was at all time able, ready and willing to complete the purchase of the said property. Eventhough the defendant's legal action did not involve the plaintiff directly but the subject matter of the action involved the same property over which the defendant had entered a caveat which the plaintiff applied to remove so that the plaintiff can sell it. Whose right should prevail? In the light of such circumstances I was quite satisfied that the defendant had shown the existence of a serious question to be tried, thereby satisfying the existence of the second stage of the test.

Balance of convenience

It is not disputed that the plaintiff's intention to have the defendant's caveat removed was only to facilitate the sale of the said property in order to settle the vendors' outstanding debt with the plaintiff. Here, the defendant was genuinely intending to purchase the said property from the vendors. It would appear to me that all that the plaintiff was interested in was the payment of the vendors' outstanding debt. The plaintiff was not interested to own the said property. On the other hand, the defendant was genuinely interested to own the said property. Upon the vendors agreeing to complete the sale of the said property to the plaintiff, there was great likelihood that from the amount of the balance purchase price the vendors' outstanding debt with the plaintiff could be fully settled. All the plaintiff needed to do was to ensure that the balance purchase price is paid to the plaintiff and everybody would be happy. On the other hand, to have the caveat removed, there would be likelihood that the said property would be disposed off to someone else thereby permanently depriving the defendant from seeking her legitimate claim to own the said property. Such being the circumstances of this case, the balance of convenience would certainly be in favour of allowing the status quo to remain. To remove the caveat would cause

irreparable damage to the defendant who contended that she had strong merits to own the said property. In the light of the above circumstances I was satisfied that the defendant had also shown the existence of the third stage of the test.

After having considered the whole circumstances of this case and after being satisfied that the defendants had proved the existence of the three stages of test as laid down in the Court of Appeal case of *Luggage Distributors,* I arrived at the conclusion that the plaintiff's application for the removal of the caveat be dismissed with costs. And I so ordered.

Plaintiff's application dismissed.

Reported by Lim Lee Na